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No. 92-1296

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE UNITED STATES OF AMERICA,
Petitioner,

VS.

DUANE BENTON, Director of Revenue, State of Missouri
MISSOURI DEPARTMENT OF REVENUE, and the STATE OF MISSOURI,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States has a common-law right to collect prejudgment interest from a state on monies paid to the state by third parties and voluntarily reimbursed by the federal government?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
ARGUMENT	5
CONCLUSION	14

TABLE OF AUTHORITIES

Page(s)

Cases:

Board of Comm'rs. v. United States, 308 U.S. 343 (1939) 6,7,10,12

Continental Bank & Trust Co. v. American Bonding Co., 630 F.2d 606 (8th Cir. 1980) 13

United States v. Atkinson, 575 F.Supp. 791 (Ct. Int'l. Trade 1983) 11

United States v. California, No. 91-2003 (April 26, 1993) 5

United States v. California State Bd. of Equalization, 650 F.2d 1127 (1981) 11,12

United States v. Imperial Food Imports, 834 F.2d 1013 (Fed. Cir. 1987) 10,11

United States v. North Carolina, 136 U.S. 211 (1890) 6

United States v. State Tax Commission, 645 F.2d 4 (5th Cir. 1981) 13

United States v. Texas, __ U.S. __, 113 S.Ct. 1631 (1993) 4,5,8

West Virginia v. United States, 479 U.S. 305 (1987) 7,8

William H. Melcher, et al. v. United States, No. 92-1297 5

Statutes:

Debt Collection Act 3,8

Section 32.065, RSMo 12

Section 144.140, RSMo 10

Section 144.190, RSMo 11,12,13

Section 408.020, RSMo 13

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. 1a-16a) is reported at 975 F.2d 511. The opinion of the District Court (Pet.App. 17a-37a) is reported at 772 F.Supp. 453. The order of the District Court (Pet.App. 38a-40a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1992. A petition for rehearing was denied on November

16, 1992 (Pet.App. 41a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The United States filed this suit alleging that it was entitled to recover taxes paid by Olin Corporation (Olin) either to its vendors or the State of Missouri. The complaint requested the return of approximately eight hundred sixty-two thousand dollars ($862,000), plus interest. While the complaint did not explicitly disclose the legal theory under which the United States brought suit, it was eventually determined to be a common law claim for *indebitatus assumpsit* or unjust enrichment.

Olin is a private, for-profit corporation which entered into a contract with the federal government to operate and manage, as an independent contractor, the Lake City Army Ammunition Plant. Olin purchased, in its own name and with its own funds, the property necessary to operate the plant and was reimbursed for its purchases by the federal government pursuant to the contract. Olin made payments of sales and use taxes to Olin's vendors or Missouri on Olin's purchases and was reimbursed by petitioner for these expenditures between November 1985 and April 1988. Neither Olin nor the federal government during this time period suggested that these tax payments were inappropriate. The federal government was not contractually obligated to reimburse Olin's tax payments if an exemption from taxation was available to Olin under state law. In the complaint, however, the federal government contended that the purchases as made by Olin were not properly subject to tax pursuant to state law because the purchases were for resale.

Both parties moved for summary judgment. In its motion for summary judgment petitioner did not request the award of monetary relief. Rather, petitioner requested the District Court to establish a schedule to allow for the calculation of remedial relief. In granting petitioner's motion for summary judgment, the District Court

rejected petitioner's request regarding relief and found that the requested relief had been adequately disclosed in answers to interrogatories and deposition testimony. (Pet.App. 36a).

Both parties requested that the District Court modify its order. Among other issues, Missouri's motion attacked petitioner's calculation of taxes allegedly paid by Olin. Petitioner, in its motion agreed that the previously calculated amount was incorrect and lowered its request. Attached to petitioner's motion was the affidavit of Everett Koechner who admitted that the amount claimed due in his affidavit may not be one hundred percent (100%) accurate, but who swore that the amount of money Olin paid in sales and use taxes was "no less than" seven hundred five thousand, seven hundred seventy-two dollars and eighty-nine cents ($705,772.89). Missouri objected to this delinquent testimony in its response to the petitioner's motion, criticized the affidavit and moved that the evidence be stricken. Thereafter, the federal government supplemented its motion to alter or amend with yet another affidavit from Mr. Koechner stating that Olin had paid six hundred eighty-three thousand, six hundred thirty-one dollars and twenty-six cents ($683,631.26) in Missouri sales and use taxes. Missouri again objected to this newly disclosed and unreviewed calculation of taxes supposedly paid by Olin Corporation but the District Court awarded the federal government this amount. (Pet.App. 40a). Likewise the District Court in its second order awarded petitioner prejudgment interest on this amount at a rate calculated pursuant to Missouri law.

On appeal, the Eighth Circuit affirmed in part and reversed in part. The Circuit Court affirmed the District Court's entry of remedial relief. The Circuit Court reversed the award of prejudgment interest finding that the Debt Collection Act of 1982 extinguished any common law right petitioner had to interest against one of the several states. The position of the Eighth Circuit concerning the effect of the enactment of the Debt Collection Act has been rejected by this Court in *United States*

v. Texas, __ U.S. __, 113 S.Ct. 1631 (1993). Nevertheless, Missouri objected to the imposition of prejudgment interest because the District Court failed to give proper consideration to the positions of the parties and fairness, selected a rate of interest provided for in Missouri law for those that comply with it which petitioner had failed to do and had failed to state the date upon which interest began to accrue.

REASONS TO DENY THE WRIT

The Court should deny the writ requested by petitioner because petitioner is not entitled to common law interest against Missouri and no claim for interest can stand in the absence of a valid judgment. Petitioner brought this case to recover taxes allegedly held by Missouri on the theory of *indebitatus assumpsit* or unjust enrichment. This Court, in *United States v. California,* No. 91-2003 (April 26, 1993), decided that such a cause of action was not available to the federal government seeking the return of taxes paid to a state pursuant to state law. Petitioner has conceded that the decision in *United States v. California* impacts the validity of the underlying debt in this cause. *See* Brief for the United States, *William H. Melcher, et al. v. United States,* No. 92-1297, pp. 11-12, in the United States Supreme Court. Alternatively, the court may wish to remand this case to the Eighth Circuit in light of *United States v. Texas,* __ U.S. __, 113 S.Ct. 1631 (1993), in that the Court's decision in that case rejected the analysis of the Eighth Circuit concerning the petitioner's claim for interest. However, in compliance with the Court's order, respondents submit the following argument concerning petitioner's entitlement under the common law to prejudgment interest.

ARGUMENT

Petitioner asserts that it has a common law right to collect interest from the State of Missouri on funds its contractor allegedly paid in taxes to its vendors and the state and which petitioner voluntarily reimbursed. The relevant caselaw dictates to the contrary.

There are few cases in which the United States attempts to collect interest from one of the states. In no discovered case has the United States attempted to collect interest in the absence of the contractual relationship with the state on monies allegedly received by the state from a third party. Thus, of necessity, the argument will be by analogy.

An analysis of the common law right of the United States to interest on the debt owed by a state should begin with *United States v. North Carolina*, 136 U.S. 211 (1890). There, the United States purchased bonds issued by the State of North Carolina. The terms of the bonds were established by law. The bonds were to pay interest at a specified rate until the bonds were due. When the bonds became payable, North Carolina failed to make timely payment. The federal government requested, in addition to principal and interest payable prior to the principal due date, prejudgment interest. This Court denied the request. *North Carolina* concerned a dispute between two sovereigns involving a request for prejudgment interest on a debt properly owed by one sovereign to the other. This Court held:

> Interest . . . is not to be awarded against a sovereign government unless its consent to pay interest has been manifested by an act of the legislature, or by a lawful contract of its executive officers.

Id. at 316. The rationale stated by the Court for this rule was "public convenience." *Id.*

The Court, emphasizing this public convenience language, again addressed the propriety of requiring a political subdivision of a state to pay interest to the federal government in *Board of Comm'rs. v. United States*, 308 U.S. 343 (1939). There the federal government attempted to collect interest when Jackson County imposed property taxes upon certain Indian lands. The tax was imposed because the government changed the type of fee by which the Indians held the land. Ultimately, the government revoked the taxable fee simple deeds it had issued and reissued nontaxable trust patents. The federal government, as guardians for an Indian, sued Jackson County for return of the amount paid in property taxes plus interest. The Court, after noting the public convenience and observing that "[n]othing seems to us more appropriate than due regard for local institutions and local

interest," determined that the United States was not entitled to interest. *Id.* at 351. The Court said

> assuming . . . that the law as to interest in governmental actions based upon quasi-contractual obligations be applicable, the United States must fail here. The cases teach that interest is not recovered according to a rigid theory of compensation from money withheld, but is given in response to considerations of fairness.
>
> [N]o claim of fairness calls upon [Jackson County] . . . to pay interest for the use of the money which she could not have known was not properly hers.

Id. at 352-53. The holding of *Board of Comm'rs.* is predicated on the notion that interest should not be assessed against governmental entities when they receive funds in the normal course of business without any notice that the propriety of their collection was challenged. Hence, the *Board of Comm'rs.* Court denied interest to the federal government on its claim against the political subdivision of the state.

The caselaw concerning the appropriateness of prejudgment interest charges between governmental entities continued to develop in *West Virginia v. United States*, 479 U.S. 305 (1987). There, the federal government sought interest against West Virginia on West Virginia's failure to discharge its obligation to reimburse the federal government for site preparation necessitated by a natural disaster. The state asked the Army Corps of Engineers to prepare the sites, acknowledged its debt for the preparation of the sites, but failed to make any payment. The Fourth Circuit permitted interest because this was a breach of contract action in which the amount due was liquidated, ascertained or agreed to and rejected the district court's conclusion that the court needed to balance the equities of the parties in the suit. The Court granted *certiorari* to determine whether West Virginia was required to pay prejudgment interest. The Court

determined that prejudgment interest was appropriate under "the long standing rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a *contractual obligation* to pay money." 479 U.S. at 310 (emphasis added). The Court determined under the circumstances of the case, where West Virginia voluntarily incurred a debt to the federal government and then simply refused to pay it without any claim that it was not properly due, that West Virginia was liable for prejudgment interest.

Recently, this Court decided that the common law concerning the payment of interest on debts owed by states to the federal government survived the enactment of the Debt Collection Act and rejected the view of several circuit courts, including the Eighth Circuit, that the Act abrogated the common law. *See United States v. Texas*, __ U.S. __, 113 S.Ct. 1631 (1993). The Court, quoting *West Virginia v. United States*, said there is a "long standing rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a underlying contractual obligation to pay money." 479 U.S. at 310. The Court also noted that

> [t]he duty to pay prejudgment interest under the common law, however, is by no means automatic. Before imposing prejudgment interest, the courts must weigh the competing federal and state interest .... And instead of imposing a pre-established rate of interest, the district courts retained discretion to choose the appropriate rate in a given case.

United States v. Texas, 113 S.Ct. 1635-36.

Under the common law principles enunciated by this Court petitioner is not entitled to receive prejudgment interest from Missouri. Initially, it must be noted, that the federal government does not have a contractual relationship with Missouri in regard to the funds upon which it seeks the payment of prejudgment interest. In fact, it has no relationship with Missouri at all with

regard to these funds. Missouri received these funds either as direct payments from Olin, a federal contractor, or from Olin's vendors, as part of their payment of Missouri sales taxes. In short, Missouri possesses funds paid to it by third parties which are wholly unrelated to the federal government. No contract controls Missouri's receipt or retention of these funds. Rather, the receipt and retention of these funds is controlled by Missouri law.

Additionally, the sum upon which petitioner seeks the payment of interest was never a sum certain. When the federal government filed its motion for summary judgment in the district court, it did not ask the court for monetary relief. Rather, the government asked the district court to establish a schedule for the calculation of remedial relief. The district court rejected this request and concluded that the federal government could collect from Missouri the amount of money disclosed in petitioner's interrogatory answers.

In the complaint, the government told Missouri that it was owed approximately $862,000. In response to Missouri's first set of interrogatories, the government stated that Olin had claimed a refund of $862,043 and incorporated this amount into its interrogatory responses. At the deposition of Everett Koechner, an Olin employee testifying on behalf of the federal government, he stated that the refund amount claimed due, approximately $862,000, was accurate. Nevertheless, Mr. Koechner testified elsewhere in his deposition that the amount due was really $858,983. Inexplicably the affidavits submitted by the federal government in support of its motion for summary judgment claimed that Olin made payments of approximately $862,000 in sales and use taxes. The federal government, in its motion to alter or amend the judgment, attached an affidavit from Mr. Koechner which admitted that the amount claimed therein may not be 100% accurate. However, Mr. Koechner swore that the amount of money Olin paid in sales and use taxes was "no less than"

$705,772.89. Missouri objected to this delinquent testimony in its response to the government's motion, criticized the affidavit, and moved that the evidence be stricken. Thereafter, the federal government supplemented its motion to alter or amend with yet another affidavit from Mr. Koechner stating that Olin had paid $683,631.26 in Missouri sales and use taxes. Missouri again objected, but the district court awarded the federal government this amount.

Importantly, Mr. Koechner's affidavits do not state whether the amount allegedly paid by Olin was paid to Olin's vendors or directly to Missouri. This is important because this is purportedly an action sounding in quasi contract or *indebitatus assumpsit*. Under such legal theories the federal government must show what Missouri received; not what Olin parted with. Missouri law permits vendors who collect Missouri sales tax to retain 2% of the gross taxes collected. Section 144.140, RSMo. These vendors are not Missouri's agents. The federal government's failure to present any evidence concerning the amount of money actually received by Missouri prevents any rationally based interest recovery by the federal government.

Of course, the most important factor in determining whether common law prejudgment interest should be awarded to the federal government against a state involves the competing equities of the parties and a weighing of the federal and state interests. The federal government is not entitled to interest on whatever amount of money Olin paid in sales and use taxes.

> The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.

Board of Comm'rs., 308 U.S. 343, 352. Consequently, the award of interest in this case, if available, is left to the discretion of the trial court. *United States v. Imperial Food Imports*, 834 F.2d

1013 (Fed. Cir. 1987). In *United States v. California State Bd. of Equalization*, 650 F.2d 1127 (1981), *aff'd*, 456 U.S. 901 (1982) (*CSBE*), the federal government asserted that sales taxes imposed on its lease of data processing equipment was an unconstitutional tax. The federal government prevailed on the substantive issue and requested an award of prejudgment interest. The court held:

> The award of prejudgment interest in a case under federal law is a matter left to the sound discretion of the trial court. . . . Awards of prejudgment interest are governed by considerations of fairness . . . and are awarded when it is necessary to make the *wronged* party whole.

Id. at 1132 (emphasis added; citations omitted). *See also United States v. Atkinson*, 575 F.Supp. 791 (Ct. Int'l. Trade 1983), *aff'd*, 748 F.2d 659 (Fed. Cir. 1984), where the court held:

> The need to compensate an injured plaintiff is a major factor in determining whether prejudgment interest should be awarded. . . . Since the injury to plaintiff is in good measure related to its own laxness in initiating this action, fairness does not dictate the granting of prejudgment interest to the plaintiff.

Id. at 795-96.

The district court's order concerning prejudgment interest is unclear in that it does not address the date interest began to accrue and which provisions of § 144.190 are applicable to the government. It is not appropriate to allow the federal government to collect interest on taxes paid by Olin between November 3, 1985 and April 1, 1988. Olin voluntarily paid these taxes believing them to be due. The federal government reimbursed Olin for its payment of these taxes, apparently again believing them to be due. It was not until on or about April 1, 1988 that the government and Olin decided that the purchases of the type on which

these taxes were paid were excluded from state tax pursuant to state law, as purchases made for the purpose of resale, and even later that the federal government actually contested the taxability of the transactions at issue.

As did the governmental entity in *Board of Comm'rs.*, Missouri accepted the tax payments made by Olin and its vendors in reliance on their conclusion that the taxes were properly due. No notion of fairness under the *Board of Comm'rs.* standard suggests that interest should be afforded for tax payments voluntarily made. Neither Olin nor the federal government have been wronged by Missouri under the *CSBE* standard. Rather, Missouri merely accepted the taxes Olin and its vendors conceded to be due. Certainly no contractual basis exists for the imposition of interest against Missouri. Considering Missouri's unquestioned good faith in the acceptance of these taxes and the district court's concession that the issue of the taxability of the transactions at issue is one of first impression in Missouri (Pet. App. 28a), fairness does not suggest that the federal government should receive interest on its voluntary reimbursement to Olin.

Moreover, the federal government should not receive prejudgment interest at the relatively high rate provided by Missouri tax law as granted by the district court. Should the Court determine that it was appropriate to award the federal government interest, Missouri suggests that the rate awarded by the district court is unreasonable. The Court should not permit the federal government to collect interest from Missouri under the terms of §§ 144.190 and 32.065, RSMo. Such an award is inappropriate because the statutory provision for interest contained therein is for the benefit of those who comply with the terms of Missouri law. Missouri law provides that a refund of taxes paid is only available to a person who is legally obligated to remit the tax; that claims for refund must be in writing, under oath and state with specificity the grounds on which the refund is sought; and that these claims be filed within three years of the

alleged overpayment. Section 144.190. The federal government did not comply with these requirements and has asserted that it was not subject to the restrictions imposed in § 144.190. It would be inequitable to allow the federal government the benefit of Missouri's revenue laws, while permitting it to avoid the law's burdens, including the statute of limitations.

Missouri's general law concerning interest is somewhat less generous than § 144.190.

> Absent statutory or contractual authorization, prejudgment interest is not allowed on an unliquidated claim. . . . Recovery of prejudgment interest may be allowed only for liquidated claims under these circumstances for an amount 'readily ascertainable by computation or by determination according to a recognized standard.'

Continental Bank & Trust Co. v. American Bonding Co., 630 F.2d 606, 612 (8th Cir. 1980) (interpreting Missouri law). The federal government did not assert that its claim was liquidated nor, as discussed above, is the amount of the claim readily ascertainable. Hence, interest should not be permitted at all. If interest is permitted, under Missouri law, it should be at no higher than the statutory rate of 9% per annum. Section 408.020, RSMo. However, in other disputes between sovereigns interest awarded has been as low as 6%. *United States v. State Tax Commission,* 645 F.2d 4 (5th Cir. 1981).

The federal government is not entitled to prejudgment interest under the common law. Missouri had no contractual relationship with petitioner in regard to the funds on which interest is sought and the principal amount of the supposed debt is not a sum certain. Most importantly, fairness, equity and the relative sovereign positions of the parties with regard to the disputed nontaxability under state law of the transactions forming the underlying debt do not support the imposition of prejudgment interest.

CONCLUSION

Missouri, for the reasons set forth above, respectfully requests that the Petition for Writ of Certiorari filed by the United States be denied.

Respectfully submitted,

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